IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.629 OF 2004
IN
NOTICE OF MOTION NO.2749 OF 2004
IN
SUIT NO.2769 OF 1998

Rohini Pradyumna Kapadia
of Mumbai, Indian Inhabitant,
residing at 4/C, Raghavwadi,
French Bridge, Chowpatty,
Mumbai 400 007. .. Appellant
(Orig.Plaintiff)

v/s.

1. Amita Kulinchandra Motiwala
of Mumbai, Indian Inhabitant,
residing at Govardhan Bhavan,
3rd floor, Dr.Deshmukh Lane,
V.P.Road, Mumbai-400 004.

2. Jyotsna Jayaraj Kapadia,
of Mumbai, Indian Inhabitant,
residing at Govardhan Bhavan,
3rd floor, Dr.Deshmukh Lane,
V.P.Road, Mumbai-400 004.

3. Hitesh Hirachand Dhokad,
of Mumbai, Indian Inhabitant,
a sole proprietor, carrying
on business in the firm name
and style of M/s.Jai Jitendra
Construction Co., having his
office at 401, Adeshwar Apts.,
Sayani Road, Khed Gully,
Prabhadevi, Mumbai-400 025. .. Respondents
(Orig.Defendants)

Mr.Shyam Diwan i/by Mr.Y.M.Chaudhary for appellant.

Mr.Virag Tulzapurkar with Mr.Sandeep Parekh for respondent Nos.1 and 2.

Mr.Bharat Chaudhary with Mr.V.R.Maniar i/by Mr.M.Dhruva & Co. for respondent No.3.

Mr.Snehal Shah for intervenor.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 8th October, 2004

ORAL ORDER (Per R.M.Lodha, J.)

The matter was heard for admission on 6th October, 2004. During the course of motion hearing, the learned counsel for respondent No.3 gave the proposal, marked "X" for identification purposes. We adjourned the matter for today to enable the appellant to consider the proposal of respondent No.3. We are informed by the learned counsel for the appellant that the appellant is not agreeable to the said proposal.

2. Hence, we heard the appeal for admission.

3. Smt.Hirabai died on 24.10.1996 leaving behind four daughters viz. (one) Rohini Pradyumna Kapadia, (two) Dhanlaxmi alias Asmita K. Motiwala, (three) Jyotsna Jayraj Kapadia and (four) Bhanumati Sunderdas. One of the daughters Rohini P. Kapadia filed the suit before this court. Two sisters viz. Dhanlaxmi alias Asmita K. Motiwala and Jyotsna J. Kapadia have been impleaded as defendant Nos.1 and 2. Curiously, the third sister Bhanumati Sunderdas has not been arrayed as the defendant in the said suit. One Hitesh Hirachand Dhokad, the sole proprietor of the firm M/s. Jai Jitendra Construction Co. has been impleaded as the defendant No.4. In the suit the plaintiff prayed for declaration that she is entitled to 1/4th share in the assets and the properties of the deceased

Smt.Hirabai and also for declaration that the agreement dated 23rd April, 2004 entered into between the defendant Nos.1 and 2 on the one hand and defendant No.3 on the other hand does not affect the rights of the plaintiff in the suit property being Govardhan Bhavan, admeasuring 572.6 sq. mtrs. bearing CTS No.657, Girgaum, Mumbai. The said suit came to be filed by the plaintiff after the defendant Nos.1 and 2 had filed probate application seeking probate in respect of the last will of Smt.Hirabai dated 25th September, 1996. In the probate proceedings the defendant Nos.1 and 2 have claimed to be executors and the legatees under the last will dated 25th September, 1996 of the deceased Hirabai. The present plaintiff filed caveat therein and the said probate proceedings have been converted in the suit. Initially, the present plaintiff took out the notice of motion in the probate proceedings seeking appointment of Court Receiver in respect of the tenanted property viz. Govardhan Bhavan and also for the order of injunction against the present respondent Nos.1 and 2 (defendant Nos.1 and 2) restraining them from dealing with or disposing of or creating any third party right, title or interest in respect of the subject property. However, the said notice of motion came to be rejected by the learned single Judge since under the will the plaintiff (present appellant) cannot be said to have any interest in

the building. Against the order of learned single Judge, the present appellant preferred appeal but that came to be dismissed. Then the present suit was filed by the appellant claiming 1/4th share in the estate of the deceased Hirabai. In the suit, the plaintiff also took out the notice of motion for appointment of Court Receiver in respect of the subject property and for restraint order. The learned motion Judge heard the parties and by the order dated 30th September, 2004 directed the present respondent Nos.1 and 2 to file an affidavit disclosing all the assets and the properties left by late Smt.Hirabai on oath. The prayer for appointment of Court Receiver and temporary injunction came to be rejected. However, the respondent No.3 (developer) was directed to give bank guarantee to the satisfaction of the Prothonotary & Senior Master to the tune of Rs.40,00,000/- or in the alternative deposit the said amount with the Prothonotary & Senior Master. The plaintiff, aggrieved by the order of the learned motion Judge dated 1st September, 2004 rejecting the appellant's prayer for appointment of Court Receiver and grant of temporary injunction, has come up in appeal.

4. Mr.Shyam Diwan, the learned counsel for the appellant strenuously urged that the learned motion Judge having proceeded on the assumption that the

plaintiff has 1/4th share in the estate of the deceased, there was no justification for refusing to appoint Court Receiver and grant of temporary injunction. The learned counsel submitted that if the respondents are permitted to demolish the existing structure and develop the property, the situation would become irreversible affecting the rights of the plaintiff in the suit property. He submitted that to obviate that situation, the learned motion Judge ought to have protected the plaintiff's right in the property. The learned counsel also placed reliance on section 213 of the Indian Succession Act and submitted that the rights of the respondent Nos.1 and 2 as executors or legatees can only be held to be established on grant of probate of the will and not until then.

5. On the other hand, the learned counsel appearing for the respondent Nos.1 and 2 as well as respondent No.3 justified the impugned order.

6. From the perusal of the impugned order, it is clear that the learned motion Judge proceeded on the assumption that the appellant (plaintiff) has 1/4th share in the estate of the deceased Hirabai. It, thus, appears that the learned motion Judge proceeded on the assumption that the plaintiff has prima facie case. However that was not sufficient to grant interim relief. The balance of

convenience and irreparable loss were not held to be in favour of the plaintiff. On thoughtful reflection we are of the view that the consideration of the matter in this regard by the learned motion Judge is proper and cannot be said to suffer from any legal infirmity. There was no serious challenge to the observation made by the learned motion Judge that the property as it stands today is not separable by metes and bounds. If that be so, then the plaintiff if held to have 1/4th share in the property could be entitled to the 1/4th proceeds if the entire property is sold. It is not in dispute before us as was not dispute before the learned motion Judge that the plaintiff herself was initially interested in developing the property and attempts were made by her in that regard. The plaintiff submits that development was sought to be made by her with the consent of the present respondent Nos.1 and 2. Be that as it may, one thing is clear that the property needs to be developed as the plaintiff also desired to develop the property. The present respondent Nos.1 and 2 have already entered into an agreement with the respondent No.3 (defendant No.3) for development of the property. We are informed that the property is occupied by over 50 tenants and the defendant No.3 has taken steps in getting 22 tenants vacated and they have been shifted to some transit accommodation. Most of the remaining tenants have

also given their consent for development. As per the plaint the valuation of the entire Govardhan Bhavan is Rs.1,50,00,000/-. The plaintiff claims 1/4th share in the property. The learned Single Judge observed that as per the market value of the property, 1/4th share of the plaintiff comes to Rs.37,50,000/- and he directed the respondent No.3 (developer) to deposit a sum of Rs.40,00,000/- with the Prothonotary & Senior Master. We are informed that the developer has deposited a sum of Rs.40,00,000/- with the Prothonotary & Senior Master of this court within the time granted in the impugned order dated 30th September, 2004 and though by our ad-interim order dated 1st October, 2004 we permitted defendant No.3 to withdraw the said amount, the said amount has not been withdrawn. The fact, therefore, remains that Rs.40,00,000/- stands deposited by the defendant No.3. That sufficiently takes care of the plaintiff's interest if she ultimately succeeds in the suit. Needless to say that the plaintiff shall have no right in the property if the probate is granted of the will said to have been executed by Hirabai.

7. The respondent No.3 submitted a proposal before us reference of which has been made above and marked "X". As per the said proposal, the area of plot is approximately 5867.99 sq.ft. The FSI of

25964.70 sq.ft. shall be consumed for tenants. The incentive FSI for redevelopment remains 12982.46 sq.ft. The defendant No.3 has proposed that about 3245.6 sq.ft. (about 1/4th of FSI for redevelopment) of the constructed area of portion can be reserved for the plaintiff subject to the decision in the suit on the terms and conditions mentioned in the proposal "X". In our view, since the respondent No.3 has already deposited a sum of Rs.40,00,000/- with the Prothonotary & Senior Master of this court which may eventually satisfy plaintiff's claim in the suit if she succeeds, yet, in addition thereto, we intend to direct the respondent No.3 to reserve the constructed portion of 3000 sq.ft. to enable the court to pass an appropriate order in case the appellant succeeds in the suit and equities are needed to be balanced.

8. We, accordingly, find no justifiable ground to interfere with the impugned order. Appeal, accordingly, fails. However, we direct that in addition to the direction given by the learned motion Judge, the respondent No.3 shall reserve the constructed area of 3000 sq.ft. to enable the Court to pass an appropriate order in case the plaintiff succeeds in the suit. The respondent No.3 shall not deal with, alienate, transfer or create any third party right or interest in the constructed portion of 3000 sq.ft. until disposal

of the suit.

9. Oral prayer made on behalf of the appellant for ad-interim relief is rejected.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)